

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON and RICHARD JENNINGS,

Plaintiffs,

vs.

TARGET CORPORATION; NBTY, INC., a Delaware
Corporation; REXALL SUNDOWN, INC., a Florida
Corporation

Defendants.

No. 11 CV 7972

Chicago, Illinois

October 4, 2013

10:47 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

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1 (Proceedings taken in open court:)

2 THE CLERK: Case number 11 CV 7972, Pearson versus
3 Target Corporation.

4 MR. WELTMAN: Good morning, Your Honor.

10:47:16 5 Stewart Weltman on behalf of the plaintiffs.

6 MR. FREIBERG: Good morning, Your Honor.

7 Peter Freiberg also on behalf of the plaintiffs.

8 MR. CARTON: Good morning, Your Honor.

9 Jeffrey Carton also on behalf of the plaintiffs.

10:47:24 10 MS. RYAN: And Elaine Ryan on behalf of the
11 Plaintiffs.

12 MS. MC CALL: Kara McCall from Sidley & Austin on
13 behalf of the defendants.

10:47:34 14 MR. DAVIS: Hello. Michael Davis, Your Honor, on
15 behalf of defendants.

16 MR. GAUL: And Christopher Gaul on behalf of the
17 defendants.

18 MS. HOLYOAK: Melissa Holyoak on behalf of the
19 objector Ted Frank.

10:47:56 20 THE COURT: I have some questions.

21 MR. WELTMAN: Sure.

22 THE COURT: I've looked through the remedies. There
23 is, I think, an obvious difficulty. Not the fault of the
24 lawyers, in fact probably not the fault of the parties either,
10:48:24 25 and I've dealt with this in one prior case, although it

10:49:08

1 resolved itself. When you're dealing on an individual basis
2 relatively small damages and damages that may be difficult for
3 an individual to prove, I don't think -- I actually searched
4 the drawer that I have where I throw things. I don't think I
5 have a receipt in any of those for any item worth less than
6 \$80.

10:49:34

7 And I looked in a drawer where I routinely and
8 foolishly just toss receipts because I find the effort of
9 walking an additional four or five steps to the trash basket
10 too much for me, so I open a drawer and I stick this stuff in.
11 And then after a year or two and the drawer is becoming
12 difficult to close, I take them, throw them out, and then I
13 start the process over.

10:50:04

14 So the actual value, the number of refunds, is likely
15 to be small. And, in many cases, even if somebody has this
16 stuff, they may not think it's worth the candle to send it in.
17 So what I regard as the single most defensible value of
18 settlement in this case to plaintiffs has to do with the change
19 in information.

10:50:37

20 MR. WELTMAN: The labeling changes.

21 THE COURT: The one question I had was, are there any
22 studies about how many people read these things?

23 MR. WELTMAN: How many people read the labels?

24 THE COURT: Yeah, read the labels.

10:50:54

25 MR. WELTMAN: Well, Your Honor, actually, yes. I'm

1 going to cite them to you, but yes, people do read the labels.

2 THE COURT: Right. How many people read the labels?

3 MR. WELTMAN: I would say most of the people, I

4 can't -- that wasn't what I was prepared to respond to today,

10:51:10

5 Your Honor, but there are consumer studies, we're familiar with

6 them, I'm familiar with them, that discuss this very point,

7 that, in fact, the point of purchase, the front of the label,

8 is the critical transaction point. It's when the consumer

9 makes the decision --

10:51:27

10 THE COURT: Well, the question is, reading fine print.

11 I'll give you an example of in another field entirely. And

12 part of it is because I knew people who practiced in the field,

13 but part of it is the evaluation that I saw from the time I

14 took the bench in 1987 to, maybe, 1992, 1993, and it had to do

10:51:52

15 with Blue Sky Laws which said, well, you do this prospectus for

16 stock you're going to issue and you have to tell certain

17 things.

18 And, ordinarily, when there was an objection when

19 somebody filed a class action for all of the people who bought

10:52:15

20 this stuff, bought these stocks, would say, well, you know,

21 they didn't tell us about this risk, they didn't tell us about

22 that risk, and then the case settled or the company went to

23 bankruptcy, one of those two things happened. And there was,

24 by the time I got on the bench, the prospectuses were pretty

10:52:36

25 large. And they became larger and larger as time went on, and

1 they got to the point where the cases started to disappear,
2 they started to find fewer and fewer Blue Sky cases. The cases
3 really depended not on the prospectus but on some public
4 statement that the CEO had made.

10:53:03

5 MR. WELTMAN: Right.

10:53:25

6 THE COURT: And one of the reasons that it was shifted
7 to them is, these prospectuses became so long that I once
8 hypothesized that you could have an issuance of the new share,
9 new set of shares, and that you'd have 20 or 30 pages of fine
10 print about all of the things that could go wrong. And I
11 reached the conclusion that you could probably, I wouldn't say
12 certainly, probably get away with putting something in a
13 prospectus which said we do not vouch for the honesty of the
14 directors and founders of this company, it is possible that
15 they will pocket money for their own purposes and not
16 diligently pursue the business.

10:53:49

10:54:11

17 My view is is that with the possible exception of the
18 people at the brokerage firms who have to read this stuff
19 seriously, the average citizen would buy the stock anyway, and
20 the reason they buy the stock anyway is to not read through 30
21 pages.

10:54:34

22 And my concern is whether I had a phenomenon here in
23 which case the label might be perfectly good but if the print
24 is small enough and it tells you all you need to know about the
25 medication or the vitamin or the non-FDA substance that's being

1 sold, does this actually influence, is the apparent injunctive
2 relief actually worth very much to the public. And,
3 particularly, what is the correction here, "individual results
4 may vary"?

10:55:00

5 MR. WELTMAN: No. No, Your Honor.

6 THE COURT: But what actually good do the "individual
7 results may vary" do?

8 MR. WELTMAN: That one is not an important labeling
9 change.

10:55:08

10 THE COURT: Yeah, but what did that one do? Because
11 there were fights about that one, too.

12 MR. WELTMAN: We just had that one because there is a
13 high placebo effect -- in fact, we make it very clear in our
14 papers, that one was just for people to know, who might not
15 otherwise presume that, that that would be, you know, a
16 possibility that individual results would vary. But that was
17 not -- I mean, that is not the keystone labeling change here,
18 of course.

10:55:25

19 The keystone labeling change is, as we've set forth in
20 our papers and put graphically, you can see it, we've attached
21 it as exhibits, each of the labels that's subject to this
22 change basically had a series of prominent representations
23 about the product, generally one, and generally two, sometimes
24 three. This is one of those. And right underneath the product
25 name, there were these three representations or two

10:55:44

10:56:09

1 representations, and if you saw the exhibits you will see that
2 that is no longer going to be there.

10:56:32

3 And we submitted, again under seal, Your Honor,
4 evidence from the company's own documents that shows that a
5 very, very high percentage of the people who purchased these
6 products deemed that to be a key message.

10:56:53

7 So it is an important result, as far as we're
8 concerned. People buy these products based upon basically two
9 reasons, one is what I will call the palliation reason, which
10 is the feel better joint inflammation or whatever, and then the
11 rebuilds, renews. People think and buy this for a long-term
12 basis believing that somehow they are going to rebuild or renew
13 their cartilage, and that's a key message that's no longer
14 going to be made on the labeling of these products.

10:57:18

15 Our view is --

16 THE COURT: The other thing that disturbed me about
17 this is, your position from the very beginning is, and I was
18 unclear on exactly where this stood, but let's take the lesser
19 form --

10:57:37

20 MR. WELTMAN: Sorry?

10:58:11

21 THE COURT: There are two things you can say about
22 something that has only a placebo effect, and we're assuming,
23 this is hypothetical, you got something that says only placebo
24 effect. You can tell people it doesn't work for anybody, alter
25 the structure in some way, but you're actually not saying to

1 them the only valuable purpose served by this is that it has a
2 placebo effect, in which case you could take a label and put a
3 glucosamine on it and instead of actually putting glucosamine
4 in the pills you could put sugar pills on there, a classic
5 placebo effect structure.

6 My difficulty is, if, basically, somebody can prove to
7 me, or to anybody, that glucosamine chondroitin doesn't do any
8 of the things by itself other than a placebo effect, the issue
9 then becomes is what the appropriate remedy is. And the
10 appropriate remedy in your case seems to be, we're going to
11 tell people, basically, there's no guarantee here, you could
12 even put more on it and say that studies have shown that it has
13 no effect at all, a lot of stuff like that, but why are we
14 going to the issue of injunctive relief in putting notices on
15 bottles for something which, if all that you said in the
16 complaint is true, shouldn't be on the market at all.

17 MR. WELTMAN: Well, Your Honor, this was the subject
18 of negotiation.

19 THE COURT: Right.

20 MR. WELTMAN: And, again, I want to point -- I want to
21 make it very clear that in our complaints there are two
22 separate issues, separate categories of what we contend to be
23 misrepresentations about the products, one is what I will call
24 the palliation, joint flexibility, pain relief, lubrication of
25 the joints, whatever you want to call that. There's a second

1 approach, that's the rebuilds, renews representation. These
2 are two separate types of representations.

3 If you take a look at the expert report of Dr. Thomas
4 Schnitzer you will see he was our expert who testified in the
5 Osteo Bi-Flex case we had in California, those are two separate
6 issues. We negotiated a deal where we tried to get as much as
7 we could, but for us to negotiate an entire complete label
8 change would've required us to go to trial.

9 So we looked at this, we knew the science was solid,
10 and we convinced defendant that it was solid on the renews,
11 rebuilds, sufficient enough they were willing to take out that
12 key representation. They were not willing to concede every
13 contention that we made in our complaint. They were not
14 willing, though we tried to bargain, to change some of the
15 palliation representations.

16 So we're confronted with, as class counsel, an offer
17 which achieves some of what we sought to obtain in this case.
18 In fact, a significant change, an entire category of
19 representations is being removed by agreement. And we, like
20 any other plaintiff's counsel in negotiation, has to make an
21 evaluation. Is this a good result, is it a perfect result?
22 No, it's not a perfect result. Of course, not. A perfect
23 result, if you accept our allegations, is to completely remove
24 all representations, but that's the byproduct of negotiation.

25 And I submit to you, Your Honor, that what we've

1 achieved in terms of the rebuilds and renews, and getting a
2 main representation taken off of the front of the labels, is
3 fairly unprecedented if not completely unprecedented in private
4 consumer fraud class actions. You can take a look at the
11:03:04 5 cases, I don't think there are any. It's a major achievement
6 to get a defendant to take one of -- the real estate on that
7 package is not large. They choose the key messages they want
8 to put on that package and we got one of those messages removed
9 by agreement. Do we get all of them? No. You know, would I
11:03:27 10 have preferred to get all of them? Of course. But that's the
11 byproduct of compromise and we perceive this to be a major
12 accomplishment by way of the litigation. It was the reasons,
13 to me, a driving factor to submit this because it is a major
14 change.

11:03:45 15 THE COURT: Okay.

16 Do you want to be heard on this at all?

17 MS. RYAN: Unless the Judge has any questions that are
18 particular to the defendants

19 THE COURT: I cannot imagine that you would want to
11:03:58 20 say anything now.

21 MS. RYAN: No.

22 THE COURT: Okay.

23 The objector?

24 MS. HOLYOAK: I do have something on this, Your Honor.
11:04:11 25 You were talking about the injunctive relief and about the

1 evaluation of it. And I think one of the problems with the
2 parties' briefs is that they ignore the Seventh Circuit law,
3 which is Synfuel, which says we need to look at the fairness of
4 the settlement based on how we're compensating these past
5 injuries.

11:04:28

6 Now, the parties have tried to distinguish Synfuel by
7 saying, well, they're not -- Synfuel doesn't apply because in
8 Synfuel they said they wouldn't be future victims. But here,
9 the real question in Synfuel was how are you compensating these
10 past injuries. And under the complaint they're basically
11 saying, hey, these class members, they wouldn't purchase the
12 product at all if they had known or they would have paid a lot
13 less if they had known that this really doesn't rebuild
14 cartilage, or whatnot.

11:04:43

15 And so the question here is, how do these future
16 changes, which apply to future customers and future purchases,
17 how does that compensate for this past injury for paying too
18 much. And it doesn't. And that's why in Synfuel it says the
19 fairness of the settlement should not be viewed differently.

11:04:59

20 THE COURT: But my question to you is, no matter how
21 large the pool you put aside for people who bought the product
22 and shouldn't have bought the product, or bought the product on
23 the basis of representations that shouldn't have been made,
24 how, in fact, do you set the system that is going to compensate
25 them for losses which, in many cases, may be 10, 15 dollars?

11:05:18

11:05:45

1 We've dealt with this before, but usually when we deal
2 with it before -- well, the cases I've dealt with this before
3 are cases in which, for example, utility provides something,
4 some service that really is absolutely worthless or very close
5 to worthless, and the defendant has in its records the name of
6 every individual who purchased. And you could reconstruct this
7 and say, okay, we're going to send you a little notice, every
8 one of these people, that there are erroneous charges and we're
9 going to give you credit on your next bill, which is a way a
10 utility company can do that.

11 We now have a fairly substantial number of people
12 whose identities are not known, who have to trouble themselves
13 to put some kind of request via stamp, if people still use
14 that, although the e-mail is a lot cheaper, and say, you know,
15 I bought three bottles of this stuff and I want my \$15 back.

16 There's some people who are going to do that, there's
17 absolutely no question, but, generally speaking, you are in a
18 situation where if you take what the Seventh Circuit said
19 literally, you've got settlements that cannot, in fact, be
20 achieved because you don't know to whom to send the money and
21 you don't know how much.

22 MS. HOLYOAK: Well, here we do. I mean, they did have
23 information for 4 million members. So they could've been --
24 they could've sent a check for 5, 10, 12 dollars, like the
25 maximum amount of the purchase, to those 4 million and still

1 remained a claims process for the others, for the remaining
2 class members, to be able to send in claims.

3 I think the other problem here is --

11:07:58

4 THE COURT: Now, do I weigh against that the cost of
5 doing that?

6 MS. HOLYOAK: I'm sorry?

7 THE COURT: Do I weigh against that the cost of doing
8 that?

9 MS. HOLYOAK: The cost of sending the direct checks?

11:08:06

10 THE COURT: The cost of hunting down the people. You
11 wind up with a fairly expensive process. And, basically, you
12 may dispense a fairly small amount of money, but what does
13 happen is -- if, for example, the defendants are managing that
14 process, you have some argument that there's a level of
15 deterrence here because they're going to have to spend money
16 finding people who bought from their store, sending checks out,
17 and maybe they won't do it the next time, but that's not the
18 same thing as considering fairness in terms of compensation of
19 the people who bought it.

11:08:36

11:08:51

20 There's a social purpose if Target winds up spending a
21 fair amount of money and using people to look at a lot of
22 papers and trying to make a decision as to whether a claim is
23 legitimate or illegitimate, that's a penalty they're paying,
24 it's a cost, but it's not necessarily a benefit to any
25 significant part of the class.

11:09:18

1 MS. HOLYOAK: Absolutely. But that's not even a
2 question here. They do have the 4 million names that they
3 could send directly that money to those 4 million people. And
4 it's not very clear why they just left it for a clearance
5 process for all 12 million, but here -- but you hit the nail on
6 the head on why that ends up being unfair, because here, as
7 we've seen, 20,000 claims have been submitted, which, as you
8 have explained, who keeps receipts, you know, from Target
9 5 years ago for their dietary supplements, the majority of
10 these are going to be for the no-proof. So it's very likely
11 that the maximum amount that's going to actually get to the
12 class is \$500,000, and then you have a side credit of
13 1.5 million and you have 4.5 million to the attorneys. They
14 are looking at more than six times what the actual class is
15 going to receive, and, of course, that is untenable under Baby
16 Products and under other cases. But so they very well could
17 have used a direct -- sent a check directly.

18 Can I talk about other points, Your Honor? Or do you
19 want to address something else?

20 THE COURT: No; go ahead.

21 MS. HOLYOAK: I want to talk a little bit about the
22 motion schedule, Your Honor. I think I -- I believe I
23 mentioned -- we argued this in our objection that under
24 In Re Mercury Interactive, it's a Ninth Circuit case, it said
25 when you're setting the objection schedule, you need to set --

1 THE COURT: Are you telling me you want more time?

2 MS. HOLYOAK: Yes, I would like more time.

3 THE COURT: I'll give you more time.

4 MS. HOLYOAK: Thank you.

11:11:01 5 THE COURT: What else have you got?

6 MS. HOLYOAK: Well, no, that is just -- not for my
7 objections, I'm saying for all class members, what happened
8 here was the fee motion came after the objection deadline. And
9 so all class members were deprived of vital information about
10 the fee, fee motion, including here the fact that they're
11 seeking a multiplier of 2.7, and absent class members are
12 interested in the fact that they be paying their attorneys
13 \$1,800 an hour for this result.

14 THE COURT: Have you actually talked to a lot of class
11:11:34 15 members?

16 MS. HOLYOAK: Have I?

17 THE COURT: Yes.

18 MS. HOLYOAK: Personally? No, I have not.

19 THE COURT: Well, that's another issue that concerns
11:11:42 20 me about this case. When we're dealing with very small stakes,
21 when it's \$15, \$20, you don't really expect that there's going
22 to be a lot of input from actual class members. You can
23 anticipate that there will be input from various entities
24 deeply concerned about their class action process in the United
11:12:08 25 States, but most of those people, and you are one of them, are

1 speaking for people and speaking for the interest of people who
2 have, with the exception probably of a few very crabby people,
3 not spent a lot of time talking to you or to their lawyers. So
4 when you start talking like this, it's a little like hearing
5 some elected official telling us what the American people want
6 when that individual has talked, if any, to a very small number
7 of people.

8 MS. HOLYOAK: Well, part of --

9 THE COURT: But the question is, leaving aside the
10 people who were somehow damaged to the tune of 20 bucks or 30
11 bucks, leaving them aside and leaving whatever emotional tug
12 there is, which is very small when the amounts are very small,
13 there must be some other purpose that your objection seeks to
14 serve other than the class members in this particular case.

15 And it seemed to me that much of your briefing dealt
16 with the basic premise that forget what the class members may
17 or may not want and may not even want to consider, the process,
18 as exemplified by this settlement, isn't achieving its overall
19 goals, not necessarily the goals of the individual class
20 members but the goals of class actions in the first place.

21 I think that a strong undercurrent in what you're
22 briefing is that this is a classic example of something that
23 really should not be occurring the way it's occurring. And
24 there are all kinds of other alternatives, but they don't
25 necessarily exist because we have various federal regulatory

1 agencies who regulate a variety of things, what we're dealing
2 with today is not one of them.

3 Although that's not the way it has to be. I know
4 people who actually have traveled to Berlin to buy vitamins
5 because the Germans certify and treat vitamins the way the FDA
6 treats penicillin or some new antibiotic, we don't do that
7 here. So, I mean, it's possible that there is some other
8 remedy but this is beyond the authority of anybody standing or
9 sitting in this courtroom now.

10 But tell me something about where you think the system
11 goes wrong without shedding a tear about the individual class
12 member and its 15 bucks.

13 MS. HOLYOAK: Well, I think you can do both at the
14 same time, because under, you know, 23(h) and the circuit
15 authority that we have, you need to have this fee motion prior
16 to the objection deadline which would solve some of the
17 problems.

18 I think some of the class members, more class members,
19 probably, would be objecting if they understood exactly that
20 they were paying \$1,800 an hour, effectively, based on the
21 multiplier, to their attorneys for this result, but also based
22 on the, you know -- on the alleged value of this injunctive
23 relief and wanting to know where is this coming from.

24 I think there is some information not available to the
25 class members and more could have objected if so. In fact,

1 that's one argument I would reject based on the settling
2 parties, they said that, well, it doesn't matter that our fee
3 motion came after the objection, and it doesn't matter that
4 this motion to seal came after the deadline because the
5 objectors will be able to respond. But there's other people,
6 the absent class members, may have objected as well if they had
7 more of this information.

8 But I agree with you, Your Honor, that there are lots
9 of problems just based on the class action law that the
10 settlement is untenable, again, based on the Third Circuit.
11 These ratios paying the class members 500,000, 1.5 and the
12 attorneys 4.5 is untenable under Baby Products and other
13 courts.

14 Did you have any other questions, Your Honor, about
15 how the Court should look at the settlement and these ratios?

16 THE COURT: I think I understand your position.

17 MS. HOLYOAK: Okay. Thank you, Your Honor.

18 MR. WELTMAN: Your Honor, there is value imparted in
19 the settlement. We submitted an expert report that shows that
20 these representations that are being removed were very
21 important and, in fact, he has estimated a value just for the
22 30-month period.

23 Now, whether or not this benefits current class
24 members, which we pointed out in the evaluation that they do,
25 because there are a substantial --

1 THE COURT: The most significant aspect of the remedy
2 sought in this case is the future worth of the change. I don't
3 think you can get around, and I don't think you particularly
4 want to get around, the proposition that these individual
5 claims are very small. The collected claim by the class has
6 some substance, because if you put a lot of people with their
7 \$15 together eventually it winds up into 6 and possibly 7
8 figures. So, I mean, there's something that's really there,
9 but the truth is, I have to consider the factual difficulties
10 and procedural difficulties in getting the funds to the people
11 who spent them.

12 And the truth of the matter is is the fact that you
13 have better data on some than you do on all does not alter the
14 fact that probably the number of known customers is less than
15 50 percent of the whole. And I'm reluctant to accept the
16 objector's proposition that when you were dealing with class
17 action, which all class members pretty much stand on exactly
18 the same footing, that one group of people whose damages are
19 easier to ascertain wind up getting paid and those who aren't
20 don't get paid, that, I think, is a general problem with class
21 actions, except usually in cases where the damages are
22 substantial you pretty much pay out to pretty much everybody
23 who was affected by it knowing that you're going to miss a few.

24 What we have here is a possibility that they could
25 adopt a procedure where you would have a better idea of the few

1 and not much of an idea, which we're never going to have, not
2 much of an idea of the whole. So from my point of view, this
3 falls--and small-stakes cases almost always do--falls in this
4 category of cases where you're not going to have effective
5 class-wide monetary relief, which is why I think the basis
6 you're offering for the fee petition and for disbursement of
7 funds, and in terms of your expert, so much more focused on
8 future benefit than it is on concerns for remedying small
9 amounts of money that were lost by people who might not have
10 bought the product if the label were different.

11 Another thing that occurs to me, and this was actually
12 my last question, so if you have anything else you want to say
13 to me first, you can do so.

14 MR. WELTMAN: Okay. Well, Your Honor, the injunctive
15 relief is a very important factor in the settlement. We've
16 said that all along. We have provided a mechanism by which
17 people who were so inclined could seek payment in claims. They
18 didn't even have to have receipts, there was a tier that they
19 could just say they had non-document purchase.

20 THE COURT: Right.

21 MR. WELTMAN: But when we're dealing with societal
22 issues, the furtherance of and importance of societal issue,
23 the elimination in futuro, in the future, of a representation
24 that, by the documents we've shown you and the expert report
25 we've shown you, is an important representation to consumers.

1 By eliminating what we contend to be a highly
2 misleading misrepresentation, we have furthered a very
3 important goal, a very important societal goal. And if the
4 Court does not take that into account -- the courts, not this
5 court but the courts in general, don't take into account
6 substantial future injunctive relief like this and compensate
7 counsel who fight for that--because we fought for it, we spent
8 time, a lot of time litigating this, hiring experts--if you
9 don't reward counsel for that and also approve it, then you
10 disincentivize future counsel from ever seeking these types of
11 very important social goals which are the social goals behind
12 the consumer fraud laws to begin with. That's what they're
13 about.

14 I mean, it's one thing to say, okay, we'll pay people
15 for their past damages as best we can, but to stop the conduct
16 which causes the harm in the future is the ultimate goal of
17 consumer fraud laws. So I submit to you, that's a reason to
18 approve the settlement, that is a reason to award counsel fees,
19 and the incentive awards that we've requested.

20 Now I'll answer your question.

21 THE COURT: I'll give you an example of why I'm
22 thinking the way I'm thinking. Many, many years ago there were
23 probably in the hundreds of cases filed against various banks
24 for their practices with respect to the administration of
25 mortgages, payment of taxes, property taxes, a variety of other

1 things. All started in Minnesota, most of the cases were
2 brought by one law firm. A judge who later went to the Eighth
3 Circuit who was a district judge in Minnesota resolved a ton of
4 them and I may have had 80 or 90 that I resolved. What
5 eventually came to pass were two things, one of which educated
6 plaintiffs' counsel and the other educated all of us. The
7 cases originally started out because there were a group of
8 plaintiffs' lawyers who thought, with some justification, that
9 these banks had adopted policies, escrow policies, that were
10 designed by the leadership of the bank to extract extra money
11 from their customers. It became clear long before the cases
12 got to me that that was not true.

13 MR. WELTMAN: That was not true?

14 THE COURT: Not true.

15 MR. WELTMAN: Okay.

16 THE COURT: The upper level of banking couldn't have
17 cared less. The practices were started by mid-level managers
18 who didn't want to go to the bank and say we paid more in
19 escrow than we took out and the banks lost money. So they
20 over-escrowed.

21 Well, it takes a lot of the moral force out of the
22 case. The Jamie Diamonds of the world probably were not aware
23 of escrow practices because they probably never had a mortgage
24 on their own and they weren't interested in that grungy part of
25 banking. And the cases eventually settled, but one of the ways

1 they settled was because as these agreements kept maturing, the
2 lawyers for both sides understood that some of these solutions
3 were not helpful to class members, and the things that the
4 lawyers thought were really good for the class met with a lot
5 of condemnation, usually by some lawyer from the neighborhood
6 who would yell, say, "you know, why are you forcing the bank to
7 do this, it's not something that my client wants, it's actually
8 damaging to my client."

9 And over a period of time, they worked out a series of
10 solutions. They worked out the solutions because they found
11 from actual practice that some things were good for the class
12 and other things were not good for the class and that in some
13 cases what was good was the kind of thing where the bank was
14 willing to give options, choose one, two, or three, and you
15 choose and do what's best for you.

16 So the final settlements of these cases were much less
17 controversial than the original ones. Granted, that in some
18 cases the banks were concerned because the transaction costs of
19 achieving this were a little high. You know, they had to have
20 somebody sending out papers saying you have choice 1, 2, or 3
21 and somebody had to record it, but it wasn't much, and it
22 worked out very well.

23 What I looked at when I saw what I thought was the
24 principal aspect of this case was the proposition that based on
25 what expert witnesses have told us, is that people pay

1 attention to labels. And if you make these changes to the
2 label, the sales will be, I guess in your case, given
3 compromise, far less contaminated by whatever salesmanship the
4 defendants want to have. But the lesson I learned from the
5 mortgage cases was, why do I have to look into the future, why
6 don't they make the changes and see what happens to their
7 sales, see what the actual damage was, see what the actual
8 benefits are.

9 What I am asked to do here is to pay a certain sum of
10 money for the value that is delivered to the plaintiff class
11 and to the public in general, why do I have to make that
12 decision as to how much should be paid for this before I know
13 what happens?

14 The truth is, if this has no effect at all on their
15 sales, none, zero, I wind up paying you and extracting costs
16 from the defendants that does not achieve the goal that your
17 expert thinks it will achieve. It may very well be that you
18 can come in here and say to me, the proof is now, the medical
19 proof is uncontrovertible that the only effect this has is
20 placebo. And, as a result, I don't know, let's say 20 percent
21 placebo for everybody that takes the pill, you have a whole
22 bunch of people who don't buy it, their sales plummet, and you
23 come in here and say this shows the public value of what we
24 have done in this case, we have forced them to do something
25 that the FDA doesn't do because they don't exercise the

1 jurisdiction, we have forced them to give honest information to
2 consumers, and as a result of this the consumers aren't buying
3 it, and they shouldn't buy, and this is a great benefit and
4 now, Your Honor, after the last 6 months or year has passed we
5 can tell you, this is the benefit we have brought, and you can
6 come in here and say we underestimated what this was worth to
7 the public and we want more as a reward for our public service.

8 And I understand that usually the last thing you want
9 to say to a lawyer is, wait for your money. We have many
10 practitioners of law in the United States -- what was that
11 great line? It was a criminal defense lawyer. It turned out
12 to be true, I can't remember his name, it was a guy in the
13 1940's, 1930's, famous New York defense lawyer, when somebody
14 would call him and tell him what their trouble was and seek to
15 come and discuss this with him, he would stop them within a
16 minute or two of their description and his answer was "I don't
17 listen, I don't think, I do not wish to hear until I receive"
18 and then he mentioned whatever amount it was.

19 So, basically, I understand why this may not be the
20 most attractive possible result for you. It also seems to me
21 to be significant in light of the argument that even the
22 objector is making, because the objector is making certain
23 assumptions about what people would or would not do under these
24 circumstances and she doesn't know either. This is her best
25 guess. And this proposal is your best guess. Why should I

1 guess when I don't have to guess? And why don't I adopt a
2 structure that says wait and see on the money? And in a
3 situation where your only incentive is the money possibly can
4 get bigger, but probably you think it won't, and if I were in
11:33:41 5 your shoes I wouldn't think it's going to get any bigger
6 either.

7 Go ahead.

8 MR. WELTMAN: May I answer the question?

9 THE COURT: Because I wanted you to understand exactly
11:33:48 10 what I'm thinking.

11 MR. WELTMAN: I understand.

12 Your Honor, if that were a possibility "maybe" would
13 be my response, but it's not a possibility. You can't
14 prospectively try to figure out what the -- you know, you
11:34:07 15 can't, like, start to say today we've got a benchmark, this is
16 the yearly sales of Osteo Bi-Flex, and then they're going to
17 implement the labeling change, and now let's see what the
18 yearly sales are. There's no -- you can't -- there may be
19 other people who buy the product for different reasons, but you
11:34:28 20 are not going to be able to measure the amount of people who
21 don't buy the product because of the removal of a key
22 misrepresentation.

23 THE COURT: Oh, that part I don't have a problem with.

24 MR. WELTMAN: So I don't know how we prove up the fact
11:34:40 25 that --

1 THE COURT: You just take a look at what their sales
2 are, what percentage of the market they had, if they had any
3 percentage, and what percentage of the market the drugs
4 themselves had. From that, you have a chance of making a
5 reasonable inference that this change was instrumental. Was it
6 entirely instrumental? Maybe not.

7 Examine, for example, if you want to take an extreme
8 example, you set out this thing saying "it absolutely doesn't
9 help" and then somebody in Sweden discovers that if you don't
10 take glucosamine with water from pure springs you increase your
11 cancer risk by 15 percent. Well, I think that would put a dent
12 in glucosamine sales and it would have absolutely nothing to do
13 with what's on the label. So there are lots of things that
14 could, theoretically, happen, but I'm still better off in terms
15 of knowledge if I take a look at what happens to sales
16 post-correction of the label. Maybe its not the most accurate
17 thing, but it's better than what I got now.

18 MR. WELTMAN: Well, actually, I submit to you, Your
19 Honor, that it's not better, and here's why, all right: We
20 don't know what -- Osteo Bi-Flex is not prohibited from going
21 on a big marketing campaign and pushing their product based
22 upon the representations they have now. We will never be able
23 to know how many people don't buy the product in the future as
24 a result of removal of these representations, but what we do
25 know, we do know right now is that if this injunctive relief is

1 put in place, then that particular misrepresentation will never
2 be made again, and that's an important goal.

3 THE COURT: But why do we know that it is important?
4 We don't know it's important, and, on top of it, we don't know
5 how important it is.

6 MR. WELTMAN: We do. We submitted to Your Honor
7 documents or evidence in consumer surveys as late as 2011 that
8 show that a very high -- I can't disclose it because it's under
9 seal, but if you can take a look at the report of Dr. Reutter,
10 in 2011 there was a consumer survey that showed a very high
11 percentage of people think of this representation is a key
12 representation. So you are now eliminating what we contend to
13 be a false representation in the future, that's the important
14 point.

15 THE COURT: Swell. But the fact is is what effect
16 does this have on the market. Are people stopping from buying
17 this stuff. And if they're stopping buying this stuff, are
18 they stopping it because of what you have gotten done or are
19 they stopping it for some other reason. If they're stopping it
20 because something else raises its head, what you did is you
21 made a terrific effort to eliminate something and it turned out
22 not to matter.

23 MR. WELTMAN: Well, let's assume nobody stops buying
24 it, okay.

25 THE COURT: Yeah.

1 MR. WELTMAN: Let's put that hypothetical in front of
2 us. We've just eliminated the representation that we believe
3 is false and people still continue to buy it. Even then, even
4 then, the consumer fraud policies and purposes behind the
5 consumer fraud laws have been furthered because now they're
6 making purchases based upon the absence of this representation
7 which we contend is fraudulent.

8 So it's a free world, people can make purchased
9 decisions based upon other things, but we have eliminated, if
10 this settlement is approved, what we contend to be a false
11 representation. And if people continue to purchase the same
12 levels, that's what they do.

13 The estimate that Dr. Reutter prepared --

14 THE COURT: But what's the value?

15 MR. WELTMAN: What's the value?

16 THE COURT: Yes.

17 MR. WELTMAN: The value is is in the marketplace there
18 should be truthful information.

19 THE COURT: And what are you attaching to the dollars?
20 I'm trying attach dollars to this.

21 MR. WELTMAN: Well, we've attempted to do that based
22 upon --

23 THE COURT: Well, and that's my problem, it's an
24 attempt.

25 MR. WELTMAN: Okay.

1 THE COURT: That's my problem, it's an attempt. That
2 there is a value to it --

3 You are leaping to his aid?

11:39:14

4 MR. CARTON: Well, if I may offer a word or two, Your
5 Honor?

6 MR. WELTMAN: Sure. Be my guest.

7 MR. CARTON: Thank you.

8 Your Honor, Jeffrey Carton of Denlea & Carton.

11:39:22

9 As interesting as the colloquy is, my concern is that
10 the Court's question sort of ignores altogether the value that
11 is otherwise being achieved in terms of the pool compensation
12 and address that's being made available to class members.

13 Your Honor doesn't have --

11:39:37

14 THE COURT: Wait. Wait. Wait. Stop. I started with
15 this premise not that that didn't count, what you're talking
16 about. I started with the premise that likely the greatest
17 value, if there is value in this, comes from what happens in
18 the future, not the past. If you want to tell me that paying a
19 fair number of people relatively small amounts of money to
20 compensate them? Yeah, that is a value. It's exactly the kind
21 of value that I'm trying to find with respect to future sales,
22 and it's dollars and it counts. What we're in the business
23 here of discussing is, what's the worth of that, how does that
24 contribute to the worth of these individual people, and how do
25 we measure the compensation to class counsel.

11:40:01

11:40:27

1 MR. CARTON: Yes, and I appreciate that. And I think
2 we framed that discussion with the information that's available
3 to the parties at this moment in time.

11:40:43

4 THE COURT: Yes, absolutely no question you're doing
5 it with respect to what's happening now.

11:40:59

6 MR. CARTON: Correct. And what we do in that respect,
7 and it may be an imperfect science, but we do our very best to
8 value two aspects of the resolution: We value the aspect of
9 the recompense that we've provided to class members, which is
10 an unlimited pool which is available to all consumers, all
11 households, and then what we try and do at the same time, Your
12 Honor, is obviously do our best to provide a basis by which to
13 value that future relief. And that future relief is value
14 based upon what we --

11:41:13

15 THE COURT: I got that.

16 MR. CARTON: Okay.

11:41:27

17 THE COURT: What you have misunderstood that the only
18 thing I was talking about is the value and the change of the
19 label, that's the only thing I was talking about. I am not
20 talking about the compensation. Although to tell you the
21 truth, the fees requested in this case for compensation of
22 those who sold is likely to be significantly smaller than the
23 compensation that would be awarded if the future actions were
24 significant. But I've said my piece and I understand your
25 piece.

11:41:58

1 MR. CARTON: Thank you.

2 MR. WELTMAN: Your Honor, if I could just make a
3 couple more comments?

4 THE COURT: Sure.

11:42:04

5 MR. WELTMAN: What Your Honor is asking is that at
6 some point in the future, I don't know, 2 years after, whenever
7 the labeling changes are made, is that we commission what would
8 be an extremely expensive study to try to figure out what the
9 causes are for whether or not -- whether --

11:42:26

10 THE COURT: I have a short answer for you for that.

11 MR. WELTMAN: Yeah.

12 THE COURT: You can get somebody to tell me how they
13 value and tell me how much it would cost.

11:42:40

14 MR. WELTMAN: Well, Your Honor, another way, again,
15 and the law looks at it this way, forget about the value of the
16 injunctive relief, just look at it as injunctive relief. It is
17 injunctive relief, it's a significant label change. And in the
18 context --

11:42:55

19 THE COURT: Okay, except you're starting on a
20 significant label change and I have no way of measuring whether
21 that is true or not. Maybe it's not significant, maybe it
22 turns out not to be significant.

11:43:09

23 MR. WELTMAN: We've submitted to you contemporaneous
24 documents in the defendants' own records that show that it's a
25 key representation to a lot of consumers.

1 THE COURT: I understand that that stuff is there, but
2 the truth of the matter is, I don't know how valid their things
3 are. So it's much better to take a look at this stuff on what
4 has actually happened as opposed to something in the future.
5 And as a matter of general policy, one of the most difficult
6 things with courts is trying to evaluate the effective future
7 injunctive relief.

8 Now, evaluating the future injunctive relief really is
9 not much of a problem if, for example -- what was that, and
10 this is the FDA that did this, that pain-killing drug that
11 drove people nuts because it was about the only thing that
12 worked, killed the pain of surgeries that involved screwing
13 something into a bone to separate two bones. It was a month of
14 television of people getting up and saying, you know, I can't
15 walk anymore because they've taken this drug off the market.
16 And they took it off the market because it did have adverse
17 effects. I can't remember the name. But that one, that's
18 pretty clear, you can get a pretty good idea.

19 But you're talking now about a mass market product,
20 you're talking about a widely advertised product, and maybe
21 putting that change in that letter on those words on the box
22 isn't going to have much of an impact. Now, do you want me to
23 tell you it's not going to have much of an effect? I don't
24 know. It might be massively effective, but I don't want to
25 make a judgment based on a guess where I don't have to guess,

1 where I can get much closer to a rational assessment of the
2 value of this, and it might be very substantial. That's where
3 I am.

4 Let me hear from the objector.

11:45:19

5 MS. HOLYOAK: I just wanted to respond, Your Honor, to
6 the fact that they are arguing that their fee should be based
7 on the advancement of a social goal. A class action is not a
8 private AG type of action. They're not supposed to be rewarded
9 for trying to further social goals and social norms.

11:45:41

10 I understand that Your Honor wants empirical evidence,
11 okay, is it a tiny effect, a large effect. It really doesn't
12 matter. If it has enormous effect for the public, maybe that's
13 great, but they should not be compensated for that fact. And
14 the Seventh Circuit recognizes that. Because who are their
15 clients? The class members. And how are their class members
16 being compensated? And Synfuel shows that injunctive relief
17 that we're talking about does not compensate them for those
18 past injuries.

11:45:57

19 THE COURT: I'm glad you said that because I was
20 pretty sure that's exactly what you were going to say, but as I
21 have approached this case, I'd like to actually hear it as
22 opposed to guessing what you were going to say. Thanks.

11:46:13

23 MS. HOLYOAK: Understand, Your Honor. Thank you.

24 THE COURT: I will probably ask for some additional
25 papers. I think from the point of view of the defendants in

11:46:33

1 this case, there's probably not a lot they want to say. They
2 just want it, I think, to be over. But the issue basically,
3 and you can give me a paper on it, on behalf of class counsel,
4 as to your views, duly considered probably after consulting
5 with experts, as to whether and to what degree it is possible I
6 might be in a much better position to decide the value of the
7 services after a period of some length. I'm not even
8 specifying the length because you may find experts who are
9 going to tell you about -- and there have been cases which I've
10 dealt with where you judge stuff on the initial effect, maybe
11 two or three, four months in, and there are some you can't tell
12 for a while.

13 So you may want to address on the hypothetical that I
14 choose to wait, you might want to address the issue as to how
15 long do I wait. And, obviously, you have some interest in
16 having that period be as short as possible, and maybe you can
17 defend the position that in three or four months we'll know
18 whether this had any effect.

19 At any rate, I am not going to rule today. Let me set
20 this for mid November.

21 MS. MC CALL: Your Honor, could I be heard on one
22 thing?

23 THE COURT: Absolutely.

24 MS. MC CALL: Thank you.

25 THE COURT: You've been so silent.

1 MS. MC CALL: I just wanted to make clear. It sounded
2 like all of the discussions today is about the reasonableness
3 of the attorney's fee award and I didn't really hear the
4 objector, or, quite frankly, Your Honor, expressing any
5 concerns about the reasonableness of the compensation that's
6 being provided to the class, i.e., the reasonableness of the
7 settlement itself putting aside what the order of attorney's
8 fees might be.

9 And, you know, we have looked into this and the
10 Seventh Circuit does allow a final judgment without deciding
11 attorney's fees. It allows attorney's fees to be decided --

12 THE COURT: I am very well aware of that.

13 MS. MC CANN: Okay. Because our position would be,
14 we think that the settlement can be approved as final without
15 having to decide the attorney's fees.

16 THE COURT: That's absolutely true.

17 MS. MC CANN: Okay.

18 THE COURT: Although, there's one thing you should
19 understand, and that is, I am unlikely to excuse you from the
20 case, because if I decide on some method of evaluation, there
21 will be data that I will need from you, from your clients.

22 MS. MC CANN: Understood. Understood.

23 THE COURT: All right. That's fine.

24 Thanks.

25 Give them a date.

1 THE CLERK: Wednesday, November 20th at 9:30.

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4 (Which concluded the proceedings had on this date in
5 the above entitled cause.)

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12 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
13 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER

14

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/s/Blanca I. Lara

date

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